

THE HIGH COURT OF MADHYA PRADESH
SINGLE BENCH
Writ Petition No.8197/2016(S)
Dr. Saiyad Ghazanafar Ishtiaque
Vs.
State of Madhya Pradesh and others

Shri Anil Sharma, Advocate for the petitioner.
Shri Abhishek Mishra, Government Advocate for the
respondents/State.

Whether approved for reporting : Yes

Law laid down:

1. Once the petitioner appointed on the post of Unani Chikitsa Adhikari under Rule 6 of Madhya Pradesh Health Services (Recruitment) Rules 1967, which gives power to the State Government to appoint a person without consultation with Madhya Pradesh Public Service Commission and said power is duly endorsed by Rule 3 of Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957 then the said appointment of petitioner would be treated as regular appointment.
2. Once the petitioner appointed on the post of Unani Chikitsa Adhikari on 03.05.1984 and regularized on 27.03.1987 by the effect of Rule 5 of Madhya Pradesh Regularization of Adhoc Appointment Rules, 1986 then his services shall be considered for the benefits of third Higher Time Pay Scale from the date of initial appointment.
3. Appointment of an employee cannot be termed dehors the recruitment rules if his appointment is as per Rule 6 of Madhya Pradesh Health Services (Recruitment) Rules, 1967 as well as under the Rule 3 of Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957.

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Present: Hon. Mr. Justice Anand Pathak

ORDER**[Delivered on 2nd day of June, 2018]**

The present petition has been preferred by the petitioner, being crestfallen by the action and inaction of the respondents, whereby the benefits of Higher Time Pay Scale has not been extended to the petitioner on completion of 30 years of his service on the ground that the petitioner was initially appointed on adhoc basis and therefore, the period spent as adhoc employee cannot be treated as regular employment for consideration of 3rd Higher Time Pay Scale to the petitioner.

2. Precisely stated facts of the case for adjudication are that in the year 1977-78, Public Health and Family Welfare Department got bifurcated and Directorate of Indian System of

Medicine and Homeopathy came into existence which is now renamed as Department of AYUSH. Service conditions of the petitioner were governed by the recruitment rules namely **Madhya Pradesh Health Services Recruitment Rules, 1967** (Hereinafter referred as "Recruitment Rules, 1967"). Public Health and Family Welfare Department issued an advertisement for the post of Unani Chikitsa Adhikari in regular pay scale of Rs. 1000-1800 on adhoc basis in the year 1984. At that point of time, the posts were fallen vacant and **Madhya Pradesh Public Service Commission** (Hereinafter referred as "MPPSC") did not conduct the selection process and under the provisions of **Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957**, (herein referred as "Regulations, 1957"), which was issued in exercise of power under Article 320 of the Constitution of India, the State Government issued the notification and declared that the adhoc appointments filled up before 31st March, 1986 are exempted from the jurisdiction of MPPSC, therein, the post of Unani Chikitsa Adhikari was also included.

3. It is further submitted that after due process of law Public Health and Family Welfare Department issued the appointment order dated 03.05.1984, whereby the petitioner was given appointment for a period of six months or till the appointment made by the MPPSC.

4. It appears that the State Government by invoking the power under proviso to Article 309 of the Constitution of India framed the rules namely **Madhya Pradesh Regularization**

of Adhoc Appointment Rules, 1986 (Hereinafter referred as "Adhoc Appointment Rules, 1986") and as per its Rule 5, the persons who have been appointed on adhoc basis before 31st March, 1986 and working on the post on said date were considered for regularization. Resultantly, the petitioner was regularized vide order dated 27.03.1987.

5. As per the submission, the petitioner received the benefits of first Higher Time Pay Scale on completion of 8 years of service and second Higher Time Pay Scale on completion of 16 years of service treating the petitioner's length of service w.e.f. 03.05.1984. On 30.09.2014 vide Annexure P-6 Finance Department, respondent No.2 herein, issued a circular whereby it has been provided to grant third Higher Time Pay Scale to the civil servants on completion of 30 years of service. Since, the petitioner was entitled for the benefit of third Higher Time Pay Scale, he made proposal to the respondent No.1 for the said benefit vide Annexure P-7 but to no avail. Annual Confidential Reports of the petitioner are above bench mark for consideration of the said benefit, but it appears that the respondents have not responded in affirmation because of the promulgation of circular dated 13.11.2009 vide Annexure P-8, wherein it is mentioned that the services rendered as adhoc employee would not be taken into consideration for Higher Time Pay Scale and earlier benefits of first and second Higher Time Pay Scale are attached with the petition to contend that respondents have caused arbitrariness and illegality in not extending the benefit of third Higher Time Pay Scale to the petitioner, whereas he has completed 30 years of service.

6. According to the learned counsel for the petitioner, Rule 12(4)(b) of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 provides for seniority of adhoc employees and it specifically stipulates the consideration of period of officiating service for the period of seniority. Once the rule provides for counting of service for seniority w.e.f. officiating service, then respondents erred in considering the case of the petitioner while treating the seniority of the petitioner from the date of regularization and not from the date of initial appointment. Respondents have given the benefits of first and second Higher Time Pay Scale to the petitioner counting his service w.e.f. 03.05.1984 which is date of initial appointment then respondents cannot take a different stand for rejection of claim of the petitioner for third Higher Time Pay Scale. He relied upon the judgment of Division Bench of this Court in the case of **State of Madhya Pradesh and another Vs. Dr. Ramesh Chandra Dixit, [2013 (IV) MPJR 123]**

7. *Per contra*, learned counsel for the respondents opposed the prayer made by the petitioner and referred the reply in which the stand taken by the respondents is that reckoning of service is to be made from the date of regularization and not from the date of initial appointment. Respondents relied upon the judgment rendered by Hon'ble Apex Court in the case of **State of Punjab and others Vs. Ishar Singh and others, [2002 (10) SCC 674]** as well as in the case of **State of State of Punjab Vs. Gurdeep Kumar Uppal, [2003 (11) SCC 732]** and in the case of **State of Rajasthan and another Vs. Surendra Mohnot and others, [AIR 2014 SC**

2925] and prayed for dismissal of writ petition because according to them, in view of the mandate of Apex Court, no case for interference is made out.

8. Heard the learned counsel for the parties and perused the documents appended thereof.

9. The case in hand is in respect of benefits arising out of third Higher Time Pay Scale. As per the submissions, the petitioner got superannuated in the year 2016. His service conditions were governed by the Madhya Pradesh Health (Gazetted Service Recruitment Rules), 1967. Method of recruitment has been provided in the said rules by way of Rule 6.

The Rule 6 is reproduced herein for ready reference:-

6. Method of Recruitment.- Recruitment to the Service, after commencement of these rules, shall be by the following methods and as far as may be, according to the proportion specified in the Schedule II.-

(a) by direct recruitment;

(b) by promotion of the members of the service as specified in the Schedule;

(c) by transfer of persons who hold post in different branches of this service or in such services as may be specified in this behalf.

[2] The number of persons recruited under clause (b) or clause (c) of sub-rule (1) shall not at any time exceed the percentage shown in the Schedule, for promotion quota of the number of duty posts (as specified in the Schedule).

[3] Subject to the provisions of these rules, the method or methods of recruitment to be adopted for the purposes of filling any particular vacancy or vacancies in the services as may be required to be filled during any particular period of recruitment, and the number of persons to be recruited by each method, shall be determined on each occasion by Government in consultation with the Commission.

[4] Notwithstanding anything contained in sub-rule (1) if in the opinion of Government, the exigencies of service so require, the government may, after consulting the commission, adopt such methods of recruitment to the service other than those specified in the said sub-rule, as it may, by order issued in this behalf prescribed.

10. The said rule provides for certain exigencies besides direct recruitment or by promotion. (Sub-rules 3 and 4) of Rule 6 provides sufficient leverage to the State Government being appointing authority for recruitment to the post of government under the rules. That power includes the appointment without consultation to the Madhya Pradesh Public Service Commission as per the Regulations of 1957, because Regulation of 1957, provides the mechanism wherein Rule 3 mandates the State Government not to consult the commission for appointment to any of the services to the extent specified in the appendix of the State Regulations.

11. Rule 3 of the Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957 is reproduced as under for ready reference:-

“3. Commission to be consulted- It shall not be necessary for the Commission to be consulted in regard to—

(a) the appointment by direct recruitment or by promotion or by transfer, to any of the posts or classes of posts or to any of the services to the extent specified in the Appendix of these Regulations;

(b) the re-employment within three years of a retired or retrenched Government Servant in a post which he was holding at the time of his retirement or retrenchment, or for duties which he had performed previously in the course of his service of his retirement or retrenchment;

(c) the appointment by promotion to any of the post or classes of posts or of any of the services other than that specified in the Appendix to these Regulations or the confirmation on such post to be made on the recommendations of a Departmental promotion Committee or a Departmental Committee set up for consideration of confirmation of officers on the aforesaid post as the case may be where such committee is presided over by the Chairman or member of the Commission.”

12. Perusal of Rule 3(a) mandates and gives an impression that the MPPSC is not required to be consulted if the State Government being appointing authority considers so for appointment on any post specified in the appendix of the regulation.

13. Appendix provides list of certain services which may not require consultation with the Public Service Commission. Entry 17(ix) includes Unani Chikitsa Adhikari and the said post could have been filled up by adhoc appointment before 31st March, 1986. Since the petitioner was appointed prior to 31.03.1986 (He was appointed on 31.05.1984), therefore, State Government could have appointed the petitioner without

consultation with MPPSC through the power deriving from the Regulations, 1957 as well as from Recruitment Rules, 1967.

14. Once the Recruitment Rules, 1967 provides the method of recruitment other than direct recruitment and promotion and same is confirmed by the Regulations, 1957 as referred above, then it becomes clear that State Government had power and authority to appoint certain classes of officers of some departments without consultation with the Madhya Pradesh Public Service Commission. Therefore, appointment of the petitioner was legal and against the vacant post and the appointing authority was State Government (under the name of his Excellency, the Governor). The said information was sent to the Secretary, Madhya Pradesh Public Service Commission as it is clear from the perusal of appointment order dated 03.05.1984 vide Annexure P-1.

15. The petitioner was regularized by the promulgation of Adhoc Appointment Rules, 1986 wherein eligibility was prescribed for regularization. The petitioner successfully passed the para-meters fixed by the authority and vide order dated 27.03.1987 he was regularized.

16. The petitioner was earlier given the benefit of first Higher Time Pay Scale and vide order dated 31.01.2009 (Annexure P-5) was conferred the benefit of Second Higher Time Pay Scale. The said order indicates that the date of completion of 16 years of service of petitioner was treated as 16.05.2000 meaning thereby, the petitioner was appointed in 1984 in the department and he completed 16 years of service in the year 2000. It further appears that respondents while granting

benefits of First and Second Higher Time Pay Scale considered the tenure w.e.f. 03.05.1984, but for grant of benefit of Third Higher Time Pay Scale respondents changed the criteria and tried to count the service of petitioner from the date of regularization. Respondents cannot do so when the petitioner's appointment was against the vacant post and his appointment was as per rules prevalent at that point of time.

17. The petitioner was regularized by the Rules of 1986 in which schedule provides the reference of Unani Chikitsa Adhikari and therefore, by the effect of said rules, the petitioner was regularized. Therefore, no illegality committed in appointment of petitioner since inception. One more aspect worth consideration in this regard is the Rule 12(4) (b) of Rules, 1961 which categorically stipulates the seniority of adhoc employees from the period of officiating service.

18. It appears that the respondents are persuaded by the circular dated 13.11.2009 vide Annexure P-8 which, in clause 4 stipulates that the service rendered as adhoc would not be reckoned for grant of Higher Time Pay Scale, but from the documents submitted by the parties, it appears that grant of Third Higher Time Pay Scale is being provided by the circular dated 30.09.2014 vide Annexure P-6 in which no such discretion carved out *viz-a-viz* earlier circular Annexure P-8. It categorically stipulates that the length of service shall be computed from the date of first appointment or (initial appointment). The said circular dated 30.09.2014 is subsequent in nature and therefore, it can be safely assumed that State Government must have taken into consideration the

earlier circular dated 13.11.2009 and its implications. The circular dated 13.11.2009 as well as circulate dated 30.09.2014 both referred the circular dated 24.01.2008. Still respondents have used the expression that third benefit would be available from the date of first appointment, therefore, Executive Wisdom cannot be taken into zone of doubt to contend that the petitioner is not entitled because the benefit of Third Higher Time Pay Scale can only be granted once the employee is regularized. Subsequent circular dated 30.09.2014 supports the cause of petitioner. No rebuttal has been made by the respondents in respect of said circular of 2014, therefore, the legislative/executive intent appears to be grant of benefit of Third Higher Time Pay Scale to be reckoned from the date of initial appointment, not from the date of regularization.

19. Division Bench of this Court in the case of **Dr. Ramesh Chandra Dixit (Supra)** dealing in respect of adhoc Assistant Professors who were appointed under the Educational Service (Collegiate Branch) Recruitment Rules, 1967 and Rule 13 (5) of Education Services (Collegiate Branch) Recruitment Rules, 1990. Those teachers were also standing on the same side where the petitioner is standing. They were initially appointed as Assistant Professors on adhoc basis, but later on they were regularized. In the said fact situation, Division Bench of this Court came to the conclusion that they are entitled to the same benefits which have been extended to other emergency appointees at par with regularized employees. The case of the petitioner appears to be standing virtually on the same footing.

20. Here, the petitioner was appointed to the post according to the Rules of 1967 and Regulations of Rules, 1957. Although appointment was adhoc, but it was sanctioned by law, therefore, the appointment would be treated in accordance with the rules. Judgment by the Hon'ble Apex Court in the case of **Direct Recruit Class II Engineering Officer's Association and other Vs. State of Maharashtra and others [AIR 1990 SC 1607]** has held that once the incumbent is appointed to the posts according to the rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The judgment of Apex Court coupled with the judgment delivered by Division Bench of this Court in the case of **State of Madhya Pradesh and another Vs. Dr. Ramesh Chandra Dixit, [2013 (IV) MPJR 123]**, the petitioner is entitled to get the benefit from the date of initial appointment.

21. Hon'ble Apex Court in the case of **State of Rajasthan and others Vs. Jagdish Narain Chaturvedi, [JT 2009 (13) SC 9]** has held that in order to become "a member of service" candidate must satisfy four conditions namely (i) the appointment must be in a substantive capacity (ii) to a post in the service i.e. in substantive vacancy (iii) made according to Rules (iv) within the quota prescribed for the source. Here, the petitioner has been appointed in substantive capacity in regular pay scale on a vacant post and by the competent authority (State Government), therefore, appointment of the petitioner cannot be held to be stop gap arrangement. It was sanctioned under the rules.

22. Judgment relied upon by the respondents did not support the case of the petitioner because the judgment rendered by the Apex Court in the case of **State of Haryana Vs. Haryana Veterinary and AHTS Association and another, [2000 (8) SCC 4]** decides the controversy by defining the regular service. Mandate of the judgment is that if service on the basis of adhoc appointment made "dehors" the recruitment rules, although without interruption followed by regular appointment on selection by Public Service Commission, held not includible in regular service. Here, the petitioner was appointed in accordance with rules and therefore, his appointment cannot be termed as "dehors" the recruitment rules. Therefore, ratio of said judgment is not applicable in the present facts situation of the case. In the case of **State of Punjab and other Vs. Ishar Singh and others, [2002 (10) SCC 674]**, wherein appointment of then petitioner was made on adhoc basis without following the procedure laid down in the recruitment rules. In respect of case of **State of Punjab and others Vs. Gurdeep Kumar Uppal and others, [2003 (11) SCC 732]**, the fact suggest that said case was in respect of Civil Medical Service Class-II [Recruitment and Conditions of Service] Rules, 1943. Therefore, the said judgment is also of no help as precedent in the case in hand.

23. From the cumulative analysis, it appears that the petitioner was appointed in accordance with rules and later on, regularized also by effect of the rules, therefore, as per mandate of **Direct Recruit Class II Engineering Officer's Association (Supra)**, seniority of the petitioner has to be

reckoned from the date of initial appointment. The circular dated 30.09.2014 vide Annexure P-6 also clarifies that the benefit to the incumbents shall be given from the date of first appointment and no way segregates between two exigencies i.e. date of first appointment and date of regularization, therefore, circular also furthers the cause of petitioner.

24. In almost similar facts situation *viz-a-viz* the present case, Division Bench of this Court also expressed the opinion in favour of the incumbent when it declared that incumbent would be entitled for the benefits from the date of initial appointment. Therefore, the case of the petitioner deserves to be allowed and is hereby allowed.

25. Writ or mandamus is issued whereby the respondents are directed to consider the case of the petitioner for grant of third Higher Time Pay Scale as he has completed 30 years of service in 2014. Necessary benefits be accorded to the petitioner in this regard within three months from the date of receipt of certified copy of this order. Petitioner would also be entitled for all consequential benefits if any accrue by effect of this order.

26. Petition stands allowed and disposed of. No cost.

(Anand Pathak)
Judge

Rashid